Europe *UK*

Multi-addressee communications: when are they privileged?

Introduction

In *The Civil Aviation Authority v Jet2.Com Ltd*[1] the English Court of Appeal considered two important questions on legal advice privilege

1. Is it necessary for a communication to have the dominant purpose of seeking or receiving legal advice in order for it to attract legal advice privilege?
2. What is the proper approach for determining the privileged status of emails between multiple parties where one of the senders or recipients is a lawyer?

Background

Jet2.Com Ltd ("Jet2") is a UK budget airline that had refused to participate in an alternative dispute resolution (ADR) scheme for consumer complaints promoted by the UK aviation industry regulator, the Civil Aviation Authority (the "CAA"). Having issued a press release criticising Jet2 for its refusal to participate in the scheme, the CAA subsequently provided its correspondence with Jet2 to the Daily Mail newspaper. This resulted in negative publicity for Jet2.

Jet2 issued a judicial review claim, arguing that the CAA's decisions to issue the press release and publish its correspondence were unlawful. As part of the claim, Jet2 applied for disclosure of all drafts of a letter the CAA had sent Jet2 on 1 February 2018 in response to Jet2's complaints about the CAA's press release (the "CAA Letter"), as well as all records of any discussions of those drafts.

The CAA argued that the drafts of the CAA Letter and the records of discussions of the drafts, which included internal CAA emails sent to both lawyer and non-lawyer CAA personnel, were subject to legal advice privilege. This is a category of legal professional privilege that protects from disclosure confidential communications between a client and a lawyer (including in-house lawyers) for the purpose of giving or receiving legal advice, whether or not litigation is ongoing or contemplated.[2]

First instance decision

At first instance, the judge concluded that the documents sought by Jet2 should be disclosed. The judge held that where a draft of the CAA Letter was sent in one email to both in-house lawyers and other non-lawyer CAA personnel, insofar as it was sent to a non-lawyer for their commercial views, neither the email nor the non-lawyer's response was protected by legal advice privilege. That would apply even if the email was privileged insofar as it was sent to the in-house lawyer. This was because the dominant purpose of the email, as addressed to the non-lawyer, was not the giving or receiving of legal advice.

The exception to this was if the content of the email, or the non-lawyer's response, disclosed or was likely to disclose the nature and content of legal advice. If so, the email/response would be privileged.

The CAA appealed against the order for disclosure.

Court of Appeal decision

It was uncontroversial that the "dominant purpose" test applied to litigation privilege, so that only communications generated for the dominant purpose of litigation were covered. However, it was unclear whether the test applied to legal advice privilege, which is restricted to communications between lawyer and client for the purpose of giving or obtaining legal advice. Indeed, in a recent case preceding *CAA v Jet2*, the Court of Appeal had concluded that the dominant purpose test did not apply to legal advice privilege (although these comments were *obiter*).[3]

1 [2020] EWCA Civ 35 (28 January 2020)

2 Litigation privilege, the other main category of legal professional privilege, covers confidential communications between a client and a lawyer, or between either of them and a third party, where the communication was made for the dominant purpose of existing or contemplated litigation.

3 Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006

In this latest case, however, the Court of Appeal (the "Court") ruled that the dominant purpose test did apply to legal advice privilege, on the grounds that

- the preponderance of authorities supported the inclusion of a "dominant purpose" criterion for legal advice privilege;
- though they have different characteristics, litigation privilege and legal advice privilege are limbs of the same privilege and there was no compelling reason for differentiating between them in this context and;
- the common law in other jurisdictions, such as Australia, Singapore and Hong Kong, had incorporated a dominant purpose test for legal advice privilege as well as litigation privilege;[4] this suggested that such a test could work in practice and that it was a legal area where there could be advantage in the common law adopting similar principles.

The Court also assessed the privileged status of emails that had been sent to multiple recipients, including in-house lawyers and non-lawyers,[5] and set out the following principles regarding the proper approach for considering such communications

- the purpose of the communication needs to be identified. If the **dominant** purpose is to obtain the commercial views of non-lawyer recipients, the communication will not be privileged, **even if** a secondary purpose is to obtain legal advice from the lawyer recipients;
- the response from the lawyer, if it contains legal advice, is almost certainly privileged, even if it is copied to more than one recipient;
- an email sent to multiple recipients should be considered as separate communications between the sender and each recipient. Where there is a multi-addressee email seeking both legal advice and non-legal (eg commercial) input, the communications to and from the lawyer will be privileged. The communications to and from non-lawyers will not be privileged, unless the dominant purpose of a specific email to/from non-lawyers is to instruct the lawyer;
- where there is a realistic possibility that a communication may disclose legal advice, that communication will be privileged in any event.

Accordingly, the Court found the relevant documents were not privileged. It upheld the judge's order for disclosure.

It also criticised the *Three Rivers (No 5)*[6] principle. This holds that legal advice privilege does not apply to all communications between a company's lawyers and its employees for the purpose of giving or obtaining legal advice, but only to communications with employees specifically tasked to seek and receive legal advice.

The Court considered that the decision was out of step with the approach adopted in other common law jurisdictions and had undesirable effects. It disadvantaged large corporations seeking legal advice (compared to smaller entities), for example. This was because in larger organisations the information on which legal advice was required was likely to be in the hands of employees who had not been tasked to seek and receive legal advice.

Even so, in this case the Court considered that it was bound by *Three Rivers (No 5)*.

4 The Court of Appeal cited Esso Australia Resources Limited v Commissioner of Taxation [1999] HCA 67 (Australia), Skandinaviska Enskilda Banken AB v Asia Pacific Breweries [2007] 2 SLR 367 (Singapore) and Citic Pacific Limited v Secretary of Justice [2016] 1 HKC 157 (Hong Kong).

5 The first instance judge had found as a matter of fact that the in-house lawyers in question had been acting qua lawyers, not as executives being consulted about largely commercial issues. If the in-house lawyers had in substance been acting as executives giving commercial advice, legal advice privilege would not apply to their communications.

6 Three Rivers District Council v Bank of England (No 5) [2003] QB 1556

Comment

The chief takeaway of this case is summarised in Hickinbottom LJ's statement:

> "[Legal advice privilege] is a privilege, and those who wish to take advantage of it should be expected to take proper care."

The Court's decision is a salutary reminder that simply copying a lawyer on correspondence or having a lawyer take meeting minutes will not in itself render the correspondence or meeting minutes privileged from disclosure.

It must be proved that the dominant purpose of the correspondence or meeting was to give or obtain legal advice. Companies should review the guidance they give employees on email communications and how to deal with multi-addressee emails, to ensure the risk of losing privilege in privileged documents is managed appropriately.

The case also confirms that, for all its difficulties, Three Rivers (No 5) remains good law. If the principle restricting legal advice privilege only to communications with employees tasked with seeking and receiving legal advice is to be overturned, it will need to be done by the Supreme Court or Parliament.

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